BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL SHANE TRADER	)	
Claimant	)	
	)	
VS.	)	
	)	
GREAT WESTERN MFG. CO., INC.	)	
Respondent	)	Docket Nos. **1,066,642 &**
	)	**1,066,643**
BERKSHIRE HATHAWAY HOMESTATE	)	
INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the January 17, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) William Belden. Michael Stang, of Overland Park, Kansas, appeared for claimant. Stephen Doherty, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated January 15, 2014, and all pleadings contained in the administrative file.

In Docket No. 1,066,642, claimant alleged personal injury to both feet by repetitive trauma with a date of injury of March 11, 2013. In Docket No. 1,066,643, claimant alleged personal injury by repetitive trauma to both shoulders with a date of injury of June 20, 2013. The parties stipulated claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment on the dates alleged.[1]

The ALJ found claimant failed to prove in both claims he provided timely notice to respondent.

[1] P.H. Trans. at 7-10, 83.

ISSUES

The sole issue in both claims is: was respondent given timely notice of claimant's injuries.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant commenced employment with respondent in 2009. He was thereafter laid off, but returned to work as a sandblaster on March 22, 2011. Claimant testified his job required prolonged standing. He further described his job as follows: "We put items in a cabinet and I step on a pedal and hold a hose and blast the material with a hose on the sandblaster."[2]

Claimant testified he experienced symptoms in his feet beginning around January 2013. He claimed he did not know at that time what was causing his symptoms. He sought treatment on his own from Dr. Julie Jones, a podiatrist, on March 11, 2013. Claimant complained of bilateral heel pain that was aggravated by bearing weight, exercise, prolonged standing and walking. X-rays of both heels were negative. The doctor diagnosed plantar fascial fibromatosis and recommended conservative care. Claimant followed up with Dr. Jones on March 25, 2013.

Claimant testified he was told by Dr. Jones that his condition was work-related. Dr. Jones' chart entry for March 11, 2013, did not reflect that opinion, nor did it appear claimant told the doctor his foot pain was related to his employment.

On March 12, 2013, claimant had a conversation with Randy Stevens, respondent's manufacturing and fabrication supervisor. According to claimant, he told Mr. Stevens his feet were hurting and that Dr. Jones told him his feet problems were work-related. Claimant testified he told Mr. Stevens his feet problems were not work-related, but thereafter changed his testimony and stated he told Mr. Stevens his feet injuries were work-related.[3] When asked why he did not make a workers compensation claim at that point, claimant responded he "wanted to try to take care of it on my own."[4] Mr. Stevens, who also testified at the preliminary hearing, denied claimant told him Dr. Jones stated claimant's condition was caused by his work. According to Mr. Stevens, he asked claimant if his feet problems were work-related, to which claimant replied in the negative.

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[2] *Id.* at 12.

[3] *Id.* at 19, 32.

[4] *Id.* at 17.

In May 2013, claimant began having left shoulder pain that had a gradual onset and slowly increased. On June 20, 2013, claimant sought medical treatment for left shoulder pain on his own with Dr. Nathan Bloom, a family practitioner. Dr. Bloom diagnosed joint pain localized in the left shoulder. Dr. Bloom's records did not document claimant told the doctor his shoulder pain was work-related. However, Dr. Bloom did note in his office record dated June 20, 2013 that "[a]t work he does a lot of sandblasting. He carries 50-70 lb boxes and boards on a regular basis."[5] Dr. Bloom prescribed medication and therapy.

Dr. Bloom authored a report dated June 20, 2013 addressed to "To Whom It May Concern." The report stated in part:

> Mr. Trader came to clinic today with complaints of left shoulder pain. It appears to be an overuse/strain of his shoulder, with pain localized around the coracoid process. We discussed treatment with avoiding heavy, repetitive lifting and high-dose ibuprofen.[6]

On June 21, 2013, Mr. Stevens and claimant talked to each other about claimant's left shoulder problems and his visit with Dr. Bloom the day before. Claimant testified Dr. Bloom told him his shoulder problems were work-related. Claimant testified he provided Dr. Bloom's June 20 report to Mr. Stevens and told Mr. Stevens his shoulder pain was work-related. Mr. Stevens testified he asked claimant if his shoulder problems were work-related, to which claimant responded "no."[7]

Claimant attended follow-up appointments with Dr. Jones on July 5 and August 12, 2013. At the August 12 appointment, claimant complained of continued heel pain that had improved since claimant's previous office visit. Dr. Jones again diagnosed plantar fascial fibromatosis. Dr. Jones provided claimant with a note imposing limited duty and indicating claimant's diagnosis was tarsal tunnel from overuse.

Claimant and Mr. Stevens again conversed on August 12, 2013, in Mr. Stevens' office. Gary Thrall, respondent's lead welder, was present. Claimant presented Mr. Stevens with Dr. Jones' report dated August 12. According to Mr. Stevens, claimant said he had a cracked (or "almost cracked") heel and that it was hereditary because claimant's mother had problems with it as well. Claimant did not recall any discussion of a hereditary

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[5] *Id.*, Resp. Ex. C at 5.

[6] *Id.*, Resp. Ex. C at 7.

[7] *Id.* at 57.

condition.[8] Mr. Stevens testified he asked claimant again if his feet problems were work-related and claimant said, "no, it's not work-related."[9]

Other than his conversations with Mr. Stevens on March 12, June 21 and August 12, 2013, claimant had no other conversations with Mr. Stevens, or any other supervisory personnel, about injuring his feet or shoulder at work.

Gary Thrall, respondent's lead welder, testified he was present at the conversation between claimant and Mr. Stevens on August 12, 2013. Mr. Thrall corroborated the testimony of Mr. Stevens that claimant denied his heel problem was work-related.

According to Mr. Stevens, he first received notice that claimant was claiming work-related injuries on July 30, 2013, when he was told that claimant had filed a workers compensation claim for a shoulder injury.[10] With regard to the foot claim, the record reflects respondent first received notice when it received correspondence from claimant's counsel dated August 16, 2013.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-520 provides:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
> Notice may be given orally or in writing.
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not

[8] *Id.* at 36-38, 55. It is noted parenthetically that Dr. Jones' records reflect a history of foot or leg cramps, and that one of Dr. Jones' secondary diagnoses was acquired equinus deformity of foot.

[9] *Id.* at 55.

[10] *Id.*, Resp. Ex. A at 1.

> designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 44-520 was amended on April 25, 2013, decreasing the number of days allotted to give notice from 30 calendar days from the date of accident or the date of injury by repetitive trauma to 20 days.

ANALYSIS

The undersigned Board Member agrees with the ALJ that claimant did not sustain his burden to prove by a preponderance of the credible evidence that respondent was given timely notice in either of the two pending claims. The proceedings in both claims are therefore not maintainable.

There is no dispute that the appropriate dates of injury by repetitive trauma are March 11, 2013, for the alleged foot injuries and June 20, 2013, for the alleged shoulder injuries. Claimant's testimony, by itself, arguably satisfied the Act's notice requirements. However, claimant's testimony on this issue was flatly contradicted by the testimony of Randy Stevens. Gary Thrall's testimony corroborates Mr. Stevens' testimony, at least insofar as the August 12, 2013 meeting is concerned. In addition, the testimony of Mr. Stevens is largely supported by typed notes he prepared at or near the events therein discussed, including the June 20 and August 12, 2013 meetings.[11]

Respondent was not given notice of the shoulder injury until July 30, 2013, and was not given notice of the foot injury until August 16, 2013. In the foot claim, notice was given to respondent well beyond the 30-day and 20-day criterion in K.S.A. 2012 Supp. 44-520. In the shoulder claim, notice was given well beyond the 20-day criterion allotted in the April 25, 2013, amendment to K.S.A. 44-520(a)(1)(A).

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[11] *Id.*, Resp. Ex. A

The ALJ heard the testimony of claimant, Mr. Stevens and Mr. Thrall. He had the opportunity to see the witnesses' appearance and demeanor. Appellate courts are ill suited to assess credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder.[12] While the Board conducts de novo review, the Board often gives some deference to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.

The undersigned Board Member finds these are appropriate claims in which to provide a measure of deference to the ALJ's opportunity to personally see and observe the testimony of all three witnesses.

CONCLUSION

This Board Member finds that claimant did not prove respondent was given timely notice of the injuries by repetitive trauma in either of the pending claims and that these proceedings are therefore not maintainable. The preliminary hearing order is affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

WHEREFORE, the undersigned Board Member finds that the January 17, 2014, preliminary hearing Order entered by ALJ William Belden is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2014.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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[12] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[13] K.S.A. 2013 Supp. 44-534a.

[14] K.S.A. 2013 Supp. 44-555c(j).

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Hon. William Belden, ALJ